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Supreme Court, U.S.
FILED
JAN 9 2001
OFFICE OF THE CLERK

No. 00-1097

In the
Supreme Court of the United States

ROBERT BROOKS,

Petitioner,

v.

CITY OF OAK RIDGE, TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant review of the opinion of the Sixth Circuit affirming the district court's dismissal of Petitioner's complaint alleging that the City of Oak Ridge's acceptance as a gift from a private, non-Buddhist foundation of a freedom bell for placement in a public walking park to commemorate the City's fiftieth birthday amounts to an endorsement of Buddhism where Petitioner does not contend that the Sixth Circuit's decision conflicts with that of another circuit or this Court, but rather seeks another layer of appellate review of a federal appeals court's correct application of Establishment Clause precedent?

2. Whether this Court should review Petitioner's state constitutional challenge to the placement in a public walking park of a friendship bell, designed without input from any Buddhist, and accepted by the City of Oak Ridge, Tennessee as a gift from a private foundation where the Sixth Circuit affirmed the dismissal on summary judgment of Petitioner's state law claims by a district judge experienced in applying Tennessee law?

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STATEMENT OF THE CASE

Petitioner Robert Brooks, a Word War II veteran with vivid memories of daunting missions performed in the Asiatic theater, filed this action under 42 U.S.C. § 1983 alleging that a friendship bell accepted for placement in a public park by the City of Oak Ridge, Tennessee amounts to the endorsement by the City of Buddhism in violation of the Establishment Clause of the United States and Tennessee Constitutions. As in his petition before this Court, Petitioner conceded below that: "The basic and essential facts of this case were not disputed by the parties." (Petition, pg. 3). On cross-motions for summary judgment, the district court granted the motion of Respondent and dismissed the Complaint. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. Contrary to the allusion made by Petitioner that the Sixth Circuit's opinion was divided, (Petition, pg. 3), the three members of the panel unanimously held that the City's acceptance of the friendship bell for placement in a public park passed the Establishment Clause test found in this Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971). The concurring judge wrote separately to express his belief that Petitioner had failed to establish that the friendship bell was a Buddhist religious symbol at all. (App. 15a).

STATEMENT OF FACTS

Respondent adopts the statement of facts set forth in the opinions of the Sixth Circuit, (App. 2a-6a) and of the district court. (App. 16a-22a.) Several of these factual findings bear emphasis. The freedom bell was created by the Oak Ridge Foundation, a private non-profit corporation having no ties to Buddhism to commemorate the fiftieth birthday of the City of Oak Ridge, Tennessee. The City of Oak Ridge was created in 1942 when President Roosevelt designated the geographic area now encompassing the City as the site of the then secret nuclear project which led to the development of the atomic bomb. The technology that ended World War II through the bombing of Hiroshima and Nagasaki in August of 1945 in turn created the City of Oak Ridge.

The friendship bell and the pavilion housing it incorporates both Eastern and Western architectural style in recognition of the connection between the birth of Oak Ridge and the dropping of atomic bombs on Hiroshima and Nagasaki. The bell is adorned with images associated with Japan and East Tennessee, such as the official flowers, birds and trees of each. Inscribed on the bell are the words: "International friendship, peace, Pearl Harbor, December 7, 1941, V.J. Day, September 2, 1945, Hiroshima, August 6, 1945, Nagasaki, August 9, 1945." (App. 3a.) The bell is housed in a wooden pavilion at the edge of a large public walking park. In close proximity to the bell pavilion is a plaque located on the pathway leading to the bell that sets forth an entirely sectarian statement of purpose adopted by the Oak Ridge City Council. (App. at 3a.) Also inscribed on the plaque is the theme of the Oak Ridge Community Foundation: "Oak Ridge, Tennessee born of war, living for peace, growing through science." (App. 4a.)

The bell and pavilion were built entirely from private funds raised by the Foundation. No funds nor any input in the design of the bell or pavilion was received from any member of the Buddhist faith. As noted by the district judge, a long-time East Tennessee resident, there are no Buddhist temples or churches in or near Oak Ridge, nor for that matter any known practicing Buddhists. (App. 19a.)

The only complaints voiced by members of the public during the Foundation's development of the friendship bell project or at public meetings necessary to accept the gift and place it on public property were from persons who believed that the friendship bell symbolized an apology to a defeated enemy. None of the members of the Oak Ridge City Council deposed by Plaintiff were aware of any connection between the bell project and Buddhism. The only "evidence" which Petitioner contends bestows a local recognition of a "religious character" about the friendship bell, a letter to the editor of the local paper, expresses the author's personal views that the friendship bell should develop some transcendent religious character to sanctify the use of atomic weapons and the cessation of their future use. As recognized by the district court, this private citizen's personal views espoused in a letter to the editor of a newspaper were never adopted by the bell committee, nor the Oak Ridge Foundation, much less the Oak Ridge City Council. (App. 21a.) The Oak Ridge City Council adopted a statement of purpose to appease any concerns about the bell project representing an apology to a defeated enemy. The community purpose was to celebrate the past fifty years of growing friendship and peace with Japan and to express for the future the profound longing and commitment to work for freedom, well-being, justice and peace for all the people of the world. (App. 21a.) As noted by the district court, Petitioner introduced no evidence that any person who has visited the site of the bell, installed in a

wide open public park, other than the Plaintiff and his expert witness, has made any connection between the bell and Buddhism. (App. 27a.)

Unlike a hypothetical reasonable observer, Petitioner comes from a unique perspective. During World War II, Petitioner was stationed in the Asiatic theater, and had the daunting task of a lone forward observer on hostile occupied islands. There, he witnessed the Japanese enemy on two occasions perform a ceremony near a bell having the same shape as the friendship bell. Thus, it is likely that the Petitioner objects to the friendship bell not based on the view of a reasonable observer inquiring whether the bell amounts to an endorsement by the City of Oak Ridge of a religion (one not practiced in East Tennessee), but rather because he associates it with his former dire enemy. However, the latter perception has no Establishment Clause implications. Neither can a clever lawyer's "spin" transmute the admittedly undisputed facts before the Court into a violation of the Establishment Clause.

ARGUMENT

I. PETITIONER HAS NOT AND CANNOT CITE ANY CONFLICT BETWEEN THE SIXTH CIRCUIT OPINION HEREIN AND THAT OF ANY OTHER FEDERAL COURT OF APPEALS RESPECTING AN IMPORTANT FEDERAL QUESTION NOR A CONFLICT BETWEEN THE OPINION HEREIN BY THE SIXTH CIRCUIT AND DECISIONS OF THIS COURT, BUT RATHER PETITIONER MERELY SEEKS ANOTHER LEVEL OF APPELLATE REVIEW, WHICH DOES NOT WARRANT THE GRANT OF CERTIORARI.

Petitioner cites no decision of any other federal Court of Appeals from which to contend that there exists a conflict respecting an important federal question. The majority of the cases cited in the petition are from the Sixth Circuit. E.g. Chaudhuri v. State of Tennessee, 130 F.3d 232 (6th Cir. 1997), Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992), Kunselman v. Western Reserve Local School District, 70 F.3d, 931 (6th Cir. 1995) and Coles v. Cleveland Board of Education, 171 F.3d 369 (6th Cir. 1999), A.C.L.U. v. Wilkinson, 895 F.2d 1098 (6th Cir, 1990), A.C. L.U. v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986), cert. denied, 479 U.S. 939 (1986). Petitioner seeks merely to distinguish these cases on their facts rather than question whether they can be reconciled with the instant case. The only decision of another Circuit Court of Appeals cited by Petitioner, Alvarado v. San Jose, 94 F.3d 1223 (9th Cir. 1996), is likewise cited merely for the proposition that the case is factually distinguished from the instant case. Thus, this petition presents no issue of a conflict amongst the federal circuits.

Nor is the only decision of this Court, cited by Petitioner, Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995), cited for the proposition that the Sixth Circuit decided this case in conflict with that decision of this Court. The instant Petition merely reiterates Petitioner's disagreement with the result reached by the district court and affirmed by the Sixth Circuit. Petitioner does not present any grounds under Supreme Court Rule 10 for the grant of a Writ of Certiorari.

Petitioner's contention that the courts below improperly applied existing law to the facts of this case is not grounds for review by this Court. In any event, an

examination of the opinion below reflects a careful and proper application of established First Amendment precedent to the facts of this case. The concurring judge was correct that the friendship bell and pavilion, of unique and local design, does not constitute a Buddhist symbol and therefore does not implicate the Establishment Clause. Government action which happens to coincide with some tenet of some religion does not in and of itself violate the Establishment Clause. The freedom bell and pavilion both are unique blends of secular art incorporating symbols which commemorate the City of Oak Ridge's birth and fiftieth birthday. Such friendship bells, symbolizing the peace and friendship now enjoyed between Oak Ridge and a sister city in Japan, are commonplace. The courts below correctly concluded that a reasonable observer would not associate the friendship bell with Buddhism much less perceive the bell's placement in a wide open walking park to be a government endorsement of a religion that does not even exist in any organized fashion in the area. While, based on his daunting experiences in the Asiatic theater, Petitioner is understandably offended by anything reminding him of those experiences, his views are not those of a reasonable observer in First Amendment jurisprudence.

Even assuming the friendship bell and pavilion are deemed symbols of religious significance as found by two of the three Judges on the panel of the Sixth Circuit, the appellate court properly affirmed the district court's application of the Lemon endorsement and reasonable observer test to the facts before it.

With respect to the purpose of the friendship bell, Petitioner's apparent suggestion that he need only demonstrate (through hearsay letters to the editor of a local paper) that the government intended to express "atonement" for the use of

nuclear devices in World War II in order to establish a prohibited purpose under the Establishment Clause finds no support in the decisions of this Court. It is not surprising then that Petitioner cites no decisions of this Court in Section I of his argument.

In any event, Petitioner's evidence submitted to the district court – a letter to the editor from a private citizen who had been a prior chairperson of the bell committee cannot be imputed to the City of Oak Ridge. Neither the Oak Ridge Community Foundation, the bell committee nor the Oak Ridge City Council ever adopted a message of transcendent religious character in the friendship bell project. As succinctly put by the district court: "There would be no discernible reason for the City Council of Oak Ridge to endorse Buddhism." (App. 27a.)

Contrary to Petitioner's assertions, the placement of secular symbols together with religious symbols does indeed ameliorate any friction between a City's intended purpose and the First Amendment. County of Allegheny v. American Civil Liberty's Union, 492 U.S. 614 (1989). The use of an explanatory plaque further diminishes the possibility that a symbol would be interpreted as an endorsement of religion unless the message is overwhelming. Id. The friendship bell can hardly be characterized as an overwhelming message of endorsement which cannot be salvaged by an explanatory plaque. The instant Petition creates no question having important First Amendment implications regarding the City of Oak Ridge's purpose behind acceptance of the gift of the friendship bell for public display.

Nor does Petitioner raise any serious federal question issue regarding the application by the courts below of the reasonable observer test. The pertinent question is not

whether there is any person, such as Petitioner, who could find an endorsement of Buddhism by Oak Ridge's public display of the freedom bell, but whether a reasonable observer would conclude, considering the context, composition and location of the bell, that it is indicative of City endorsement of Buddhism. The composition of the display is unique, incorporating secular symbols and writings of East Tennessee and Japan. The context of the friendship bell is entirely consistent with its composition. Since the City of Oak Ridge selected the project to commemorate its fiftieth birthday and the theme "Born of war, living for peace, growing through science," the selection of a project incorporating local and Japanese symbols and historic dates in Word War II is entirely appropriate.

With respect to the entanglement test, the friendship bell was privately funded with no Buddhists involved in its design or development (other than the casting of the bell itself which is only done in Japan). As reflected in the pictures submitted by Petitioner as Appendix E (App. 36a-37a) the friendship bell pavilion is located in a wide open park with walking trails. The pavilion is in a small, but solid structure requiring very little maintenance. Volunteers, not taxpayers, perform any limited maintenance chores. With respect to Oak Ridge ordinances concerning the ringing of the friendship bell, it first should be noted that none of the evidence referenced by Petitioner (October, 1997 public controversy over ringing of the bell, "Ringing of the bell on December 31, 1999") were matters of record before the district court before judgment. Application of the relevant factors to the evidence fully supports the decisions of the Courts below. The challenged display was privately funded. There is no interaction whatsoever between the City of Oak Ridge and the Buddhist faith. Petitioner is a mature adult not an impressionable child. The bell pavilion is located near one

boundary of a wide open public park, hundreds of yards from any government building. There is no government coercion for citizens to view the challenged object. Petitioner's reliance upon an Oak Ridge ordinance prohibiting the ringing of the bell with its large wooden pole distances rather than entangles the City of Oak Ridge from any possible aspect of Buddhism. The ordinance prohibits the ringing of the bell in a manner consistent with tenets of Buddhism since to do so would create a great deal of noise and a potential nuisance.

Finally, the potential longevity of the freedom bell cannot suffice to establish excessive governmental entanglement with Buddhism given the dearth, if not complete absence, of evidence of an improper religious purpose and/or perception by a reasonable observer of endorsement of Buddhism.

The asserted arguments of Petitioner present no important federal question warranting review by this Court.

II. PETITIONER HAS PRESENTED NO GROUNDS FOR REVIEW BY THIS COURT OF HIS STATE CONSTITUTIONAL CHALLENGE.

While it is doubted that the Court would have jurisdiction to accept this question presented, it is clear that Petitioner's state constitutional challenge presents no important question of federal law to warrant review by this Court.

CONCLUSION

The instant Petition presents no conflict amongst the circuits, conflict between the decision herein of the Sixth Circuit Court of Appeals with an opinion of this Court, nor any important federal question undecided by this Court. The Petition merely seeks another level of appellate review of a decision by the district court with which Petitioner disagrees. Having presented no grounds for review by this Court, the Court should deny Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

CITY OF OAK RIDGE

/s/_____

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